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Tort Theory, Private Attorneys General, and State Action: From Mass Torts to Texas S.B. 8

https://doi.org/10.1515/jtl-2022-0009
Published online March 17, 2022

Abstract: Late twentieth-century tort theory was dominated by scholars who regarded tort law as primarily a means employed by government to deter anti-social conduct. On this model, tort plaintiffs are cast as private attorneys general whose lawsuits promote safety. Tort theorists today better appreciate that this approach obscures crucial respects in which tort law is private law–law that empowers persons who have been wronged to redress the wrongs done to them. But in practice there is a continued failure to perceive the ways in which the deterrence model has shaped and distorted views of tort law, as evidenced by the terms on which both the 'right' and the 'left' critique modern mass tort litigation. More troublingly, the problem extends beyond the field of torts. Indeed, we contend that the lawyerly loss of feel for distinctions between public law and private law explains the inability of the United States Supreme Court Justices, in Whole Woman's Health v. Jackson, to capture why S.B. 8–Texas's radical anti-abortion statute–really is a private attorney general statute and why, as such, it should be subject to preenforcement constitutional review.

Keywords: abortion, IIED, mass torts, private attorneys general, outrage, private law, S.B. 8, state action, tort theory

> The plaintiff sues in her own right for a wrong personal to her…[1]

1 Introduction

An invitation to write for an issue of the Journal of Tort Law on the state of tort theory is a call for a check-up, a report card, or an accounting. "How's it going?," one wants to know.

1 Palsgraf v. Long Island R.R., 162 N.E. 99, 100 (N.Y. 1928).

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In many respects, the answer is: "quite well." The breadth and diversity of tort-theoretic work in the American legal academy is impressive. As compared to those in other common law jurisdictions, debates here arguably are more wide-ranging and lively. Welfarist, rights-based, and critical theories have been developed and deployed with great sophistication. And a chorus of practice-oriented scholars stands on the sidelines, helping to keep theorists honest by challenging them to demonstrate the practical value of the theoretical enterprise.

And yet there are also grounds for concern. Too many lawyers, judges and scholars remain in the thrall of a stylized theory of tort law that flourished in the late twentieth century, and that treats it primarily as a means employed by government to deter anti-social conduct. On this model, tort plaintiffs are cast as private attorneys general: their lawsuits are merely another tool in government's regulatory arsenal. Today, it is better appreciated among tort theorists that this 'pure public law' account obscures crucial respects in which tort law is private law —law that empowers persons who have been wronged to redress the wrongs done to them. But in practice and to some degree still in the academy, there is a continued failure to grasp the pernicious influence of this regulatory conception of tort.

In what follows, we explain how the pure public law model has distorted the terms on which both the 'right' and the 'left' critique modern mass tort litigation. We then demonstrate that its reach extends well beyond the field of torts. Indeed, we contend that the lawyerly loss of a feel for distinctions between public law and private law helps to explain the inability of the United States Supreme Court in *Whole Woman's Health v. Jackson*[2] to capture why S.B. 8—Texas's radical anti-abortion statute—really is a private attorney general statute and why, as such, it should be subject to pre-enforcement constitutional review.

In sum, too many lawyers, judges, and scholars remain captivated by, and captive to, the slogan that tort law is "public law in disguise"—*so much so that they have difficulty recognizing an actual instance of public law in disguise when it is right before their eyes*. Unlike genuine tort plaintiffs, persons authorized to sue by S.B. 8 do *not* sue in their own right, for wrongs personal to them. Instead, their nominally personal actions are law-enforcement actions of the sort typically prosecuted by state officials. By appreciating both the influence and insuperable difficulties of theories that cast tort law as public law, readers can come to see why Justices on both sides of *Jackson* failed to explain clearly why the petitioners are entitled to pre-enforcement review of S.B. 8.

2 142 S. Ct. 522 (2021).

2 Tort Law as Public Law: From Compensation to Regulation

The seeds of scholarly efforts to reconceive tort law as public law were planted in the late nineteenth century: a time that, not coincidentally, saw the birth of the administrative state and the idea that modern government should scale up to address systemic social problems as such. In 1881, Oliver Wendell Holmes, Jr. was already emphasizing the extent to which judges' views on questions of economic policy influenced their adjudication of cases raising issues of common law.[3] However, he did so mainly to encourage judges to exercise greater self-awareness as they went about the traditional business of deciding cases under law, rather than in aid of reimagining the role of courts in the modern state. Two decades later, we find in Holmes's work hints of what would become the first major iteration of the public-law outlook. The "isolated, ungeneralized wrongs" of past eras, Holmes observed in 1897, were increasingly giving way to predictable losses incident to the operation of large industries and, for the latter, "the question of liability, if pressed far enough, really is a question of how far it is desirable that the public should insure the safety of one whose work it uses."[4] It is not clear what Holmes meant when he wrote of "insur[ing] the safety" of workers. However, it would be consistent with his longstanding insistence that tort law be understood as a law of indemnification (more on this below) that he meant to convey that modern tort law at times functioned as a compensation system, and in particular as a way of ensuring that workers who are injured on the job get compensation for their injuries.

While Holmes offered this observation in passing, subsequent scholars would develop it more systematically over the course of the first half of the twentieth century. According to this 'first-gen' conception of tort law as public law, negligence law could be understood as, and shaped to do for victims of auto accidents and slips and falls, what worker's compensation statutes had (in principle) done for many employees—it could provide relief for humanly caused small-scale disasters analogous to the relief that governments sometimes provide for large-scale natural disasters. Later in the century, the same idea would serve as an argument for expansions of liability, especially those that would enhance the ability of injured consumers to obtain compensation through the doctrine of strict products liability.

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3 Oliver Wendell Holmes, Jr., The Common Law 1 (1881).

4 Oliver W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 467 (1897).

Importantly for our purposes, the tort-as-compensation-system idea still had some room for tort plaintiffs understood as *claimants*—as plaintiffs who sue in their own right. Indeed, the ambiguity of the concept of indemnification helped to ensure a relatively smooth transition from traditional private law conceptions of tort to the tort-as-compensation-system variant of the public-law model. In part because of his precocious articulation of the idea of civil liability as a mere price or fee—an idea today associated with economic theories of tort—Holmes is sometimes cast as a deterrence theorist. But this is mistaken. He thought that deterrence was the business of criminal law, whereas he understood tort to be a law of indemnification. Specifically, it was law that—against the default 'liberal' principle that losses lie where they fall—identified circumstances in which a person could be ordered by a court to bear another's loss by virtue of having failed to avail himself of a fair opportunity to avoid causing the loss.[5] Later theorists repurposed this idea of indemnification by altering the grounds on which a tort plaintiff was entitled to claim it. No longer was compensation grounded in a Holmesian notion of individual responsibility and accountability. Instead, compensation was understood as justified because it advanced the public policy goal of redistributing and spreading losses (even if there were no independent grounds for deeming the defendant genuinely responsible for the loss). On this view, courts deciding tort cases served as administrators of a special-purpose public insurance scheme.

The compensation-system conception of tort law is nicely on display in Prosser's musings on the purposes of tort law in the introduction to the 1941 first edition of his torts treatise.[6] In Section 2, titled "Tort and Crime," Prosser followed Holmes in sharply distinguishing the two. Whereas criminal law uses punishment to deter crime and vindicate the public interest, "[t]he civil action for a tort … is commenced and maintained by the injured person himself, and its purpose is to compensate him for the damage he has suffered at the expense of the wrongdoer."[7] Reinforcing this contrast, Prosser added: "The idea of punishment, *or of discouraging other offenses*, usually does not enter into tort law, except in so far as it may lead the courts to weight the scales somewhat in favor of the plaintiff's interests in determining that a tort has been committed in the first place."[8] Summing up, he explained that, "[i]n recent years there has been a growing appreciation of the fact that the law of torts is concerned chiefly with the distribution of the losses

5 *See* John C. P. Goldberg & Benjamin C. Zipursky, *Thomas McIntyre Cooley (1824–1898) and Oliver Wendell Holmes (1841–1935): The Arc of American Tort Theory*, *in* Scholars of Tort Law 43, 53–56 (James Goudkamp & Donal Nolan eds., 2019).

6 William L. Prosser, The Law of Torts (1941); Christopher J. Robinette, *Professor William Lloyd Prosser (1898–1972)*, *in* Scholars of Tort Law, *supra* note 5, at 229, 241–42.

7 Prosser, *supra* note 6, at 10.

8 *Id*. at 10–11 (emphasis added).

inevitable in a civilized community, in accordance with the court's conception of social justice."[9]

If Prosser nicely summarized the tort-as-compensation view, he also alluded to an alternative public-law conception of tort law that would later come to dominate among U.S. torts scholars Section 4 of the treatise (titled "Factors Affecting Tort Liability"), singles out five considerations that tend to figure prominently in judicial decisions imposing tort liability: (1) whether the defendant was at fault (in the sense of having engaged in socially undesirable conduct); (2) how the case at hand relates to precedents; (3) the extent to which the imposition of liability might generate administrative difficulties; (4) the relative capacity of plaintiff and defendant to bear the loss; and, finally, (5) "prevention and punishment."[10] As to "prevention," we are here told:

> [t]he 'prophylactic' factor of preventing future harm has been quite important in the field of torts. The courts are concerned not only with compensation for the victim, but with admonition of the wrongdoer. When the decisions of the courts become known, and defendants realize they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm. Not infrequently one reason for imposing liability is the deliberate purpose of providing that incentive…While the idea of prevention is seldom controlling, it very often has weight as a reason for holding the defendant responsible.[11]

Although Section 4 gives more prominence to tort law's preventive function than did Section 2, the two sections arguably coalesce around the idea, already mentioned, that courts use tort law to provide victims with the ability to obtain compensation, yet, in fashioning the rules that determine which victims will recover compensation, tend to take into account the general deterrent effects of those rules.[12] More difficult to reconcile with this picture is a gloss on tort law that Prosser awkwardly sandwiched between Sections 2 and 4. According to Section 3 of the treatise, tort law should be understood as a form of "social engineering," that is, the adjustment by courts of "competing interests of

9 *Id*. at 11 (internal citations omitted). Prosser's contemporary, Fleming James, Jr., offered perhaps the most thoroughgoing attempt to understand (and reform) tort law so that it could operate as a compensation scheme, at least until it could be replaced by more comprehensive systems. Guido Calabresi, *Professor Fleming James Jr (1904–1981)*, *in* Scholars of Tort Law, *supra* note 5, at 259, 263–67.

10 Prosser, *supra* note 6, at 18.

11 *Id*. at 26–27.

12 *See* Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 Tex. L. Rev. 1801, 1804 (1997) (noting that subsequent editions of the Prosser treatise continued to contain passages expressing skepticism about tort law's deterrent effects, and mentioning other compensation theorists).

individuals to achieve a desirable social result."[13] Prosser elaborated on this idea as follows:

> Perhaps more than any other branch of the law, the law of torts is a battleground of social theory. Its primary purpose, of course, is to make a fair adjustment of the conflicting claims of the litigating parties. But the last half century has brought an increasing realization of the fact that the interests of society in general may be involved in disputes in which the parties are private litigants. The notion of "public policy" involved in private cases is not by any means new to tort law…; but it is only in recent decades that it has played a predominant part. Society has some concern even with the single dispute involved in a particular case, but far more important than this is the system of precedent on which the entire common law is based, under which a rule laid down is to be followed until the courts find good reason to depart from it…There is good reason, therefore, to make a conscious effort to direct the law along lines which will achieve a desirable social result, both for the present and for the future.
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> In any society, it is inevitable that [human] interests shall come into conflict…[I]n a civilized community, it is the law which is called upon to act as arbiter. The administration of the law becomes a process of weighing the interests for which the plaintiff demands protection against the defendant's claim to untrammeled freedom in furtherance of his own desires, together with the importance of those desires themselves. When the interest of the public is thrown into the scale and allowed to swing the balance for or against the plaintiff, the result is a form of "social engineering" that deliberately seeks to use law as an instrument to promote that "greatest happiness of the greatest number," which by common consent is the object of society.[14]

In sum, one finds in the opening pages of the Prosser treatise an expression of the tort-as-compensation-system idea that flourished from roughly 1940 to 1970, but also the raw materials for a very different iteration of the public-law conception of tort—one that pushes compensation to the background while foregrounding the idea of judges fashioning legal rules with the aim of inducing individuals and firms to behave in ways that achieve "a desirable social result" or that maximize utility. By the 1970s, these notions of regulation and deterrence would be front and center in a new generation of public law theories of tort, particularly the efficient deterrence theories offered by the likes of Guido Calabresi, Richard Posner and Steven Shavell. And it is with the emergence of these "pure public law theories" that the tort plaintiff is rendered entirely contingent. Whereas Prosser could still cogently treat the average tort plaintiff as a genuine complainant—as a person in some sense claiming on her own behalf—deterrence theorists effaced entirely the idea that a tort plaintiff sues in her own right "for a wrong personal to her." On this understanding, tort plaintiffs are

13 Prosser, *supra* note 6, at 15.

14 *Id*. at 15–17 (internal citations omitted).

individuals who happen to have incentives to regulate on behalf of the public good. The power to sue and recover is conferred on them by the legal system to achieve a public good (even if it also brings them private benefits), and in this sense they are appropriately described as private attorneys general.[15]

Several factors account for the emergence of pure public law tort theory. Mid-twentieth century accident law, no less than its predecessors, proved to be a slow, cumbersome, and arbitrary compensation scheme.[16] While alternatives such as workers compensation, auto no-fault, and private and public insurance had their problems, if the goal really is compensation, all seemed more promising than tort law. Meanwhile, the massive military effort of World War II and the arrival of the second New Deal highlighted the need for, and promise of, governmental regulation to achieve collective goals such as improved air quality or workplace safety.[17] Also critical was the emergence at this time of modern aggregate litigation, a phenomenon that Abram Chayes in 1976 aptly described as "*public law* litigation."[18] Class actions and their procedural progeny enabled courts to go beyond what Prosser had proposed (namely, courts consciously constructing legal rules that, through the operation of stare decisis, would set policy going forward) by addressing social problems in real time. Through aggregate litigation and the aggressive deployment by judges of equitable remedies, entire industries could be made to change their behavior, while thousands of victims could obtain relief.

For these and other reasons, by the 1970s, law professors who hoped to be in the thick of the historical moment, but who were writing on court-centered rather than agency-centered topics, sought to identify a role for the judiciary as an arm of the proactive administrative state. A slightly doctored line from the world-weary Rick in *Casablanca* captures the sentiment: "it doesn't take much to see that the problems of [two] little people don't amount to a hill of beans in this crazy world."[19]

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15 Schwartz, *supra* note 12, at 1816 (noting that tort plaintiffs, on economic accounts, are cast as private attorneys general). As Bill Rubenstein has observed, use of the phrase "private attorney general" first became prevalent among U.S. jurists in the 1970s. William B. Rubenstein, *On What A "Private Attorney General" Is–And Why It Matters*, 57 Vand. L. Rev. 2129, 2135 (2004). As he also explains, the term is used in different ways. We use it here to convey the idea of a person who is granted the power to pursue and prevail on a legal claim for the purpose of vindicating a government's regulatory goal, regardless of whether the claim also serves to vindicate any legal right of that person's (which it may or may not). A *qui tam* relator is a clean example of a private attorney general in this sense, although hardly the only example.

16 *See, e.g.*, John G. Fleming, The American Tort Process 18–21 (1988) (outlining the U.S. tort system's high transaction costs).

17 *Id.* at 8–9.

18 Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976) (emphasis added).

19 Casablanca (Warner Bros. Pictures 1942).

In modern, mass society, government actors (including courts) have more important things to do than concern themselves with the micro-norms of interpersonal interactions—with how *D* is obligated to act toward *P*, and how *P* can respond if *D* breaches that obligation. Rather, they should attend to such interactions only insofar as doing so provides the basis for advancing important, macro-level policy objectives. And, instead of serving as counterparts to the Social Security Administration (the tort-as-compensation-system model), the courts could play a regulatory role comparable to that of a regulatory agency such as EPA or OSHA (the tort-as-regulation model). The tort plaintiff, on this understanding, is important for purely instrumental reasons—as the person who has enough of an interest in a dispute implicating a policy problem to be bothered to pursue the matter in court.

Interestingly, among lawyers, courts and some scholars, the pure public law vision of tort law as a grant of regulatory authority to the courts not only survived, but in some ways gained steam with, the Reagan Revolution and its skeptical pushback against the regulatory state. Indeed, early economic theorists such as Posner touted tort law as regulation that could be achieved without relying on a bloated, overreaching bureaucratic state. More recently, the reanimation in the U.S. of libertarian ideology, followed in recent decades by the era of legislative dysfunction—and, with both, the waning in the political branches of an appetite or ability to fashion systematic responses to social problems—has gone hand-in-hand with skepticism among some scholars as to a conception of tort law that empowers courts to use tort litigation and liability to advance regulatory goals. This, of course, is the crux of the modern 'tort reform' movement. But other scholars have doubled down, drawing the opposite conclusion. It is precisely because our most pressing problems, from police misconduct and climate change to opioid addiction and pandemic control, are only sporadically and incompletely addressed by the political branches that tort law—now more than ever!—is needed to serve as regulatory law. Emblematic of this vision is the idea of courts, via MDL proceedings, filling regulatory gaps by using the occasion of tort suits to summon all relevant constituencies to hammer out quasi-legislative solutions to serious social ills.

3 Beyond the Interpretive Swamp

For our purposes, the important points to emphasize about today's most visible anti-tort/pro-tort debates are that: (1) they tend to take place *within* the pure public law conception of tort; and (2) these analytical underpinnings are either taken for granted by both sides, or deemed relatively unimportant, given the

(perceived) reality that tort law can be and is used to obtain systematic policy results. The pro-tort contingent, in areas ranging from constitutional torts to securities fraud, tout the value of having an army of private attorney generals at the ready, prepared to help make up for the limited enforcement efforts of political-branch officials. Relatedly, they look to tort law as a system for shifting social costs onto entities that seem well-situated to pay for them. The anti-tort contingent, meanwhile, worries about the downside of private-enforcement—worries expressed, for example, in efforts to limit class actions and the ability of successful tort plaintiffs to recover punitive damages in the name of deterrence, punishment, or societal compensation. Within these debates, the question whether a public law model of tort law is interpretively sound has been mostly ignored, or deemed quaint and unimportant.

In the realm of tort theory, starting in the late twentieth century, a number of scholars have articulated why public-law models—especially the pure public law model—are interpretively unsound, and why it is vitally important to understand the ways in which tort law really is private law.[20] As they have explained, getting tort law right, interpretively, permits students to be properly educated about what the law is, allows scholars to make progress on important issues in the law, and enables an appreciation of the value of having a law that defines a set of interpersonal responsibilities and holds us all accountable for failing to meet them. By contrast, pure public law theory leaves us in an interpretive swamp, in which all of these educational, critical, and social values are lost.

The point we will press here is different. It is that lawyers, legislators, judges, and other public officials are destined to make significant legal and political mistakes because of the extent to which the pure public law tort theory today dominates. The mistakes fall into several categories, but here we shall focus on the problem of treating tort plaintiffs as mere law-enforcers.

4 The Contingent Plaintiff Problem

Among the clearest articulations of the pure public law theory are those found in Posner's and Calabresi's influential early works.[21] Posner's theory of negligence is

20 *See, e.g.*, Jules L. Coleman, The Practice of Principle: In Defence of a Pragmatist Approach to Legal Theory (2001); John C. P. Goldberg & Benjamin C. Zipursky, Recognizing Wrongs (2020); Ernest J. Weinrib, The Idea of Private Law (rev. ed. 2012). In criticizing certain features of these accounts, Hanoch Dagan and Avihay Dorfman have offered a distinct take on the public/private distinction. *See* Hanoch Dagan & Avihay Dorfman, *Just Relationships*, 116 Colum. L. Rev. 1395 (2016).

21 Guido Calabresi, The Costs of Accidents: A Legal and Economic Analysis (1970); Richard A. Posner, *A Theory of Negligence*, 1 J. Legal Stud. 29 (1972).

representative. The basic function of negligence law, it maintains, is to incentivize efficient precaution-taking by those who engage in risky activities by requiring them to internalize the costs of the harms flowing from their activities. What matters is that the tort system imposes liability so that the anticipation of such damages will lead rational actors to alter their conduct in a manner that is socially beneficial, all things considered. Posner acknowledged that he had to explain why, on this understanding of negligence, liability should require a lawsuit commenced and pressed by the injured party (instead of by anyone with the desire and ability to see to it that liability is imposed) and why the damages should be paid to the injured party (instead of government). On average, he claimed, injured parties will be more efficient claim-pursuers than officials or bystanders, in part because they will have better access to evidence.[22] And the prospect of recovering compensation is what gives the injured party the incentive to go to the trouble of litigating.[23]

Although there was a libertarian tilt to Posner's account, it would be a mistake to suppose that the pure public law account is captive to conservative politics. If anything, Calabresi's more left-leaning *The Costs of Accidents* places greater emphasis on the idea of tort law as pure public law. At a somewhat more grounded level, standard scholarly defenses of modern mass tort litigation cast them in the same light. Without the prospect of liability, it is argued, fraud and other forms of corporate misconduct would be more rampant than they are. Even if the compensation ultimately paid to individual victims is negligible, as long as the aggregate liability facing businesses is not, then liability is realizing its promise. Standard accounts of products liability and civil rights law carry with them more than a whiff of the same approach. Litigation that is putatively in the name of private plaintiffs is deemed important, in the end, because of the threat of liability to corporations and government officials.[24]

While we are the last to downplay the importance of wrongdoer accountability, we see a categorical mistake in the particular version of accountability offered by pure public law theories, whether politically liberal or conservative. Crucially for us, and for other theorists who emphasize the private-law dimensions of tort, accountability in tort law is not a freestanding notion; it is accountability *to* someone, and indeed it is accountability to the person or entity one has wrongfully

22 William M. Landes & Richard A. Posner, *The Private Enforcement of Law*, 4 J. Legal Stud. 1, 31 (1975).

23 Kemezy v. Peters, 79 F.3d 33, 35 (7th Cir. 1996) (Posner, J.) (noting that punitive damages awards in tort cases take pressure off the criminal justice system by giving victims a monetary incentive to take on the costs of law enforcement).

24 For a clearly articulated progressive rendition of pure public law tort theory, see Thomas H. Koenig & Michael L. Rustad, In Defense of Tort Law (2001).

injured according to the law.[25] On this understanding, the plaintiff is at the center of a tort suit because what government is doing in providing courts that hear tort cases is empowering victims to hold injurers accountable *to them* for having committed legal wrongs against them. While nothing in this conception suggests that courts should be blind to the public policy implications of their decisions, the core of the decision is whether this plaintiff (or this kind of plaintiff) should be able to hold this defendant accountable to her or them, given what the defendant did to her or them. That is why, even as there are crucially important public law aspects to tort law, it is inescapably a form of private law. And this is why the plaintiff is an ineliminable feature of a tort suit, not merely a convenient instrument of public policy. Even in class actions, suit is predicated on the idea that each member of the class sues in her own right for a wrong personal to her.

Another way to draw the same distinction is as follows. When a court grants a remedy to a plaintiff, it typically imposes a duty or liability on a defendant. But in cases of liability the *basis* for liability—the grounds on which the plaintiff is entitled to have the state assist her by holding the defendant liable to her—varies depending on who is suing for what. In a standard civil lawsuit, when a court holds the defendant liable to the plaintiff, it is fulfilling a duty owed by government to citizen to assist them in obtaining a remedy in light of what others have done to (or failed to do for) them. In particular, in a tort or contract case, it is the defendant's violation of the plaintiff's legal right—for example, the right not to be negligently injured by the defendant, or the right to receive certain goods from the defendant—that generates the power to obtain a remedy. In criminal law and regulatory law, things work differently. The court typically imposes liability on the defendant at the behest of a disinterested government prosecutor, and does so on the ground that the defendant has violated a legal conduct-rule, irrespective of whether another individual's legal right has been violated (though often it has).[26] Liability to punishment aims to render the rules efficacious, and to hold the defendant accountable to the public for having broken them.

Many of the gravest problems in our legal system today stem from the fact that judges and lawyers (and some scholars) have lost their grip on what tort suits, as private-law suits, are all about. Since the late 1970s, political conservatives have complained bitterly about tort litigation, especially mass tort litigation, and they

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25 Goldberg & Zipursky, *supra* note 20, at 111–46.

26 Disinterested, that is, in the sense of not having a personal stake in the events giving rise to the prosecution. *See* Young v. United States ex rel. Vuitton et Fils S.A., 481 U.S. 787, 803–09 (1987) (noting that federal law requires prosecutors to be disinterested and holding that, although a federal judge may appoint a private attorney to prosecute for contempt a violator of the court's order, the judge may not appoint to that role an attorney for a party who stands to benefit from the order that was violated).

have pushed through a great deal of reform aiming to curtail it. Fundamental to these complaints is the observation that those whose legal rights have supposedly been violated (e.g., persons who have lost wealth in reliance on fraudulent misrepresentations related to securities) are not—except in symbolic form—the beneficiaries of the resulting verdicts or settlements. Of course those supporting mass litigation argue that the reduced role of the plaintiff is more than offset by the deterrent effects it can achieve.[27] Yet, even if correct on its own terms, this rejoinder is not fully responsive to the conservative critique. More deterrence may be desirable, but there remains a question as to the authority of the class action bar to undertake this regulatory function. To the extent that lawyers can legitimately claim to have such power, it presumably derives from the power of those whom they represent, which should in turn stem from their clients having suffered legal rights violations that the law empowers those clients to redress. A system that effectively cuts victims out of the loop is troubling from a governance point of view.[28]

From the opposite side, one hears powerful complaints that damages reforms, immunities, and preemption defenses have gone too far. Tort reformers around the country have cut deeply into putative tort victims' rights to redress by sheering off damages awards as a statutory matter. In some states, it is not only damages for supposedly ethereal 'noneconomic' harms that are capped, but damages for 'concrete' economic losses as well. The argument is that the costs of goods and services have risen too much because of tort liability. It is one thing to temper damages out of a realization that juries may too frequently hit up a deep pocket for more than is warranted by way of compensation. It is quite another to decide that courts should not fully compensate tort plaintiffs who are deserving, under the law, of full compensation because we prefer to have cheaper goods and services.[29] Here too, the idea that the plaintiff who has really proven her case is *entitled* to hold the defendant accountable for her injury has seemingly slipped from view. The series of Supreme Court decisions ratcheting up government immunity in civil cases—including civil rights cases—is yet another example of treating the injured plaintiff's role as a tangential matter in civil litigation.

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27 *See, e.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. Pa. L. Rev. 103 (2006).

28 *See, e.g.*, Richard A. Nagareda, Mass Torts in a World of Settlement (2007) (analyzing how legal fees might be structured and regulated to permit the resolution of mass tort litigation on terms suitably reflective of the interests of claimants); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closur*e, 96 Cornell L. Rev. 265 (2011).

29 *See* John C. P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law for the Redress of Wrongs*, 115 Yale L.J. 524, 527 (2005) (discussing Virginia's cap on compensatory damages in medical malpractice actions).

Among the most important topics in tort law today is mass torts. Again, those positioned on the left, the right, and the center are equally troubled. When tens of thousands of individuals have plausible claims that they have been genuinely injured by a defendant's tortious conduct, armies of plaintiffs' and defendants' lawyers amass before overmatched trial judges around the country. As Elizabeth Chamblee Burch and others have demonstrated, the elaborate processes through which lawyers concoct resolutions to these disputes—which resolutions judges usually bless—tend to leave the actual injured parties largely out of the picture.[30] Trials are too complicated, so settlements are reached, but the individual—the one with the genuine complaint to have been injuriously wronged—is rarely given a meaningful opportunity to decide whether she wants to settle on the terms proposed. Because it is her claim, she is both legally and morally entitled to make that decision, yet she is left on the sideline while the lawyers work things out. Here is but another example of the problems bequeathed to us by an overly public law conception of tort law.

5 *Jackson*. *S.B. 8*. and the Private Law–Public Law Distinction

The examples raised in the previous part concern tort claims, but the pure public law conception has infiltrated our legal world so thoroughly as to generate problems far afield from torts. Indeed, we maintain that the Supreme Court's shaky treatment of Texas's anti-abortion law in *Whole Woman's Health v. Jackson* owes its shakiness in part to the skewed tort theory that today infuses the lawyerly and judicial mindset.[31] It perhaps should go without saying that *Jackson* poses a number of thorny questions in the law of federal courts that we are not best-positioned to answer, and will not purport to answer in this brief essay.[32] Our point is not to chide the Justices for failing neatly to resolve all of these difficult issues. Instead, we aim to demonstrate that they failed to recognize the importance of the private law/public law distinction to their resolution.

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30 Elizabeth Chamblee Burch, Mass Tort Deals: Backroom Bargaining in Multidistrict Litigation (2019).
31 142 S. Ct. 522 (2021).
32 Even assuming that a federal court is authorized to provide relief to the *Jackson* plaintiffs, there remains the question of which persons might properly be enjoined from enforcing S.B. 8. For example, would it be the Texas Attorney General, on the ground that S.B. 8 plaintiffs, by legislative delegation, are exercising the powers of that office? Or might it be state court clerks?. Alternatively, is enforcement more appropriately accomplished by issuance of a declaratory judgment that would provide the basis for prompt dismissals of subsequent S.B. 8 actions?

Jackson addressed what may prove to be one of the most consequential features of S.B. 8: namely, its unusual enforcement provisions. The Act contains a stringent legal rule prohibiting doctors from performing or inducing abortions: "a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required by [another Act provision] or failed to perform a test to detect a fetal heartbeat."[33] Nonetheless, the Act does not allow "enforcement" of the prohibition by the state, a political subdivision, or officials of either.[34] Instead, it provides for direct enforcement only through "private civil actions."[35] In order to prevail on such an action, the claimant need only prove that the defendant engaged in the prohibited conduct: there is no stated requirement of proof of injury. If the claimant prevails, the court is instructed by the Act that it "shall award" injunctive relief sufficient to prevent the defendant from violating the Act in the future, and statutory damages to the claimant in an amount not less than $10,000 for each unlawful abortion performed.[36]

Federal courts have the authority to enjoin state officials charged with enforcing statutes that chill the exercise of constitutional rights, and they have the authority to do so prior to any enforcement actions by the state having taken place. Thus, the key question raised in *Jackson* concerns the application of this authority to enjoin nominally *private* lawsuits that threaten such a chill. During oral argument, Justice Thomas asked Texas Solicitor General Stone why the Court should not regard the civil actions authorized by the Texas Act as *de facto* public enforcement actions, with enforcement being delegated to private citizens acting as "private attorneys general."[37] Stone replied with a slippery slope argument: "every tort action undoubtedly advances a

33 Tex. Health & Safety Code Ann. § 171.204(a) (West 2021). The statute includes an exception for medical emergencies. *Id*. at § 171.205(a). It also subjects to liability persons who knowingly aid or abet prohibited abortions. *Id*. at § 171.208(2).

34 *Id*. at § 171.207(a). Although the statute does not authorize Texas officials to prosecute S.B. 8 violations, eight Justices found that violations of the Act might expose violators to other sanctions (such as the revocation of a medical license) that are issued at the behest of state officials, and held that the impositions of these sanctions could be seen as indirect methods of enforcement by state officials. *Jackson*, 142 S. Ct. at 535; *id*. at 544 (Roberts, C.J., concurring). However, a recent Texas Supreme Court decision seems to have foreclosed this path to pre-enforcement. Kate Zernike & Adam Liptak, *Texas Supreme Court Shuts Down Final Challenges to Abortion Law*, N.Y. Times (Mar. 11, 2022), https://www.nytimes.com/2022/03/11/us/texas-abortion-law.html.

35 Tex. Health & Safety Code Ann. § 171.208 (West 2021).

36 *Id*. at § 171.208(b). The Act also forbids any subsequent civil action based on a violation that has already been the subject of such an action. *Id*. § 171.208(c). We note the significance of this provision below. *See infra* text accompanying note 54.

37 Transcript of Oral Argument at 46, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21–463).

state-preferred policy."[38] His point was that the Court could not deem actions brought under the Texas Act to be official enforcement actions without thereby giving the federal courts vast authority to enjoin any private lawsuit seen to threaten the exercise of federal constitutional rights.

In her *Jackson* opinion, Justice Sotomayor rejected this argument. Specifically, in footnote four, she reasoned that the Court could issue an injunction against Texas officials that would operate to block private actions under the Act because the latter are simply exercises of official enforcement power delegated by state officials to private citizens. A statute that authorizes suits by private citizens who have no "pre-existing personal stake" in conduct violating the statute—persons who lack "standing" to sue in their own right—is, she reasoned, a law that delegates state law-enforcement power to private plaintiffs in a very literal way.[39]

For its part, Justice Gorsuch's majority opinion dismissed Justice Sotomayor's reasoning. Picking up the thread of the position outlined by Solicitor General Stone, it suggested that her logic would apply equally to suits for damages based on alleged violations of antitrust laws, federal civil rights laws, and state tort law, thus inappropriately conferring on federal courts the authority to enjoin "'the world at large.'"[40] Although eight justices entertained the idea of pre-enforcement review of the Texas Act on other grounds,[41] the majority's dismissal of Justice Sotomayor's footnote four argument appears to validate Texas's strategy for delaying review of the constitutionality of the Act by relying exclusively on private actions for enforcement. No surprise, then, that other states have taken *Jackson* as a green light for the application of similar enforcement schemes to activities ranging from abortions to the sale of guns.[42]

Given the importance of this issue, it is at one level surprising that the Justices resolved it without more extensive analysis. About all we have to go on is the majority's conclusory suggestion that actions brought by litigants under the Texas Act cannot be distinguished from ordinary civil actions of a sort that federal courts cannot enjoin. But, for reasons we have explained in previous sections, there is

38 *Id.* at 47.

39 Whole Woman's Health v. Jackson, 142 S. Ct. 522, 550 & n.4 (2021) (Sotomayor, J., concurring in part and dissenting in part).

40 *Id.* at 535 (majority opinion) (*quoting* Alemite Mfg. Corp. v. Staff, 42 F.2d 832 (2d Cir. 1930) (L. Hand, J.)).

41 *See supra* note 34.

42 *See* Alanna Vagianos, *Arizona Republicans Introduce Texas-Style Abortion Ban*, Huffpost (Jan. 18, 2022), https://www.huffpost.com/entry/arizona-republicans-introduce-texas-style-abortion-ban_n_61e70c57e4b03874b2dde7b2; Shawn Hubler, *Newsom Calls for Gun Legislation Modeled on the Texas Abortion Law*, N.Y. Times (Dec. 12, 2021), https://www.nytimes.com/2021/12/12/us/politics/newsom-texas-abortion-law-guns.html.

also a sense in which there is nothing surprising going on here. For the Justices' debate took place within the distorting framework of the pure public law conception of tort. To make the same point in reverse: in order to grasp what is problematic about the Texas Act one must understand the structure of tort law—and, more generally, the distinction between public law and private law. In keeping with decades of domination by the tort-as-pure-public-law framework, the Justices showed little ability to articulate what it is that makes private rights of action conferred by tort law distinct from private rights of action conferred by, for example, the federal False Claims Act. Yet this is exactly the issue that demands explication.

We can flesh out our point by considering what is right and what is wrong with the majority's attempted rebuttal of Justice Sotomayor's footnote four. Justice Gorsuch appears to have taken it to argue that, because civil lawsuits authorized by the Texas Act would have a deterrent effect on those providing abortions, and because it affords damages to plaintiffs in part to amplify that deterrent effect, plaintiffs pursuing these claims were necessarily standing in the shoes of state officials. Given that many federal statutory claims brought by private litigants (e.g., under civil rights or antitrust laws), and many common law claims, are either designed to have or tend to have a deterrent effect, the implications of this logic would generate for federal courts an extraordinary and implausible range of equitable power over private litigants.

At one level, this rebuttal is clearly correct. *If* Justice Sotomayor's argument for treating private plaintiffs as delegees of state governmental power (and hence actors who can be sued for violating the Constitution) were rooted merely in the deterrent effect of civil liability, it would have to be rejected. The problem is that this is not the best rendering of what Justice Sotomayor wrote. As noted, on her view, what makes the rights of action afforded by the Texas Act distinctive is that they allow suits and recoveries by individuals who have no "pre-existing personal stake" in the underlying conduct giving rise to them, while also barring state officials from enforcing it—a combination of features that attests to the Act's treatment of nominally private plaintiffs as persons authorized to undertake the sort of general law enforcement that is ordinarily the job of government officials. Yet, even Justice Sotomayor struggled to articulate the problem as clearly as she might have.

In fact, it was Justice Thomas's colloquy with Solicitor General Stone, mentioned above, that provided the most sustained attention to the nature of suits brought under the Texas Act. In particular, he challenged Stone's assertion that plaintiffs suing under the Act are akin to garden-variety tort plaintiffs: "usually, when you think of traditional torts, there is a duty, there's an injury to the

individual. It's a private matter. There is no requirement [under S.B. 8] that there be an injury to the plaintiff."[43]

Solicitor General Stone replied that, even though the Act does not specify an injury requirement, the Texas Supreme Court was likely to read that requirement into the statute so as to conform it to state-law standing requirements, and thus that the only plaintiffs who would be able to sue under the Act are those who could prove a concrete injury. Then, to Justice Thomas's follow up question: "So what would that injury be in this – under S.B. 8 if it's an injury in fact?",[44] Stone offered this reply:

> One example could be akin to the injury suffered in the tort of outrage, where an individual becomes aware of a non-compliant abortion and they suffer same sort of extreme emotional harm. That would ground an Article III injury for purposes of Texas law that would be sufficient to satisfy the Texas Article-III style screen that addresses some of my friends on the other sides' concerns about an unlimited set of lawsuits or that anyone could possibly bring an S.B. 8 action.[45]

When Justice Thomas pushed for greater depth and clarity, Stone elaborated as follows:

> An individual discovers that – that someone – that a close friend of theirs who they'd spoken with about – about pro-life issues and about abortion has chosen instead to have a late-term abortion in violation of S.B. 8, and they were very invested in the – basically, in that child's upbringing and the child's coming into being. To the extent to which there's going to have to be a tighter nexus or what – what's a sufficient injury in fact is going to be something that the Texas courts have to develop in the first instance. And, of course, there's going to be some – there's going to be some tether between a real-world – not just an offense but sort of grievous offense that we underline – that we understand underlies IIED as a tort and still nonetheless has a real-world – a real-world harm.[46]

What is striking here is the subtle but crucial shift in Stone's argument. What starts out as an argument about standing (that plaintiffs suing under the Texas Act will be persons who can demonstrate what counts as an injury under Texas standing law) ends up being an argument about substantive tort law (that plaintiffs suing under the Texas Act will be persons who can prove something akin to a claim for the tort of outrage). Even though both typically turn in part on the issue of whether the plaintiff can demonstrate having suffered a genuine injury, the question of

43 Transcript of Oral Argument at 47, Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021) (No. 21–463).

44 *Id.*

45 *Id.* at 47–48. This tort is more commonly referred to as "intentional infliction of emotional distress" or "IIED."

46 *Id.* at 49.

whether a person has standing to pursue a claim is different from the question of whether the plaintiff can make out a tort claim.[47] (Many tort plaintiffs who can show that they have been injured lose their suits because they can't show that the injury was tortiously inflicted.) Under Justice Thomas's questioning, Solicitor General Stone switched from the former to the latter.

Which *should* matter for the question that was before the Court in *Jackson*: whether S.B. 8 plaintiffs can establish injury for standing purposes *or* whether they can establish something akin to a tort claim, given the content of the Texas Act? One cannot answer the 'standing-or-tort?' question without first reviewing why this choice presents itself. What is the potential constitutional significance of the challengers' focus on whether the individual plaintiffs have a real stake in these claims, and on the nature of their stake? Solicitor General Stone was, understandably, trying to cover his position both ways, but neither he nor the Justices were particularly clear about which one matters and why.

Two negative points seem quite straightforward. Article III does not set rules of standing for state courts. Moreover, none of the Justices seemed to take issue with Solicitor General Stone's claim that at least some S.B. 8 plaintiffs would, under Texas law, have standing to sue. It thus seems more plausible to believe that what matters to the resolution of the question at the center of *Jackson* is whether S.B. 8 plaintiffs are really bringing the equivalent of a tort claim. The reason this matters is because what we one needs to know is whether S.B. 8 plaintiffs would be suing, at least in part, to redress violations of their own rights. If they are suing for "a wrong personal to [them]," then it would not be the case that their lawsuits are purely vehicles for the enforcement of S.B. 8's conduct rule, i.e., the rule that says that "a physician may not knowingly perform or induce an abortion on a pregnant woman if the physician detected a fetal heartbeat for the unborn child as required … or failed to perform a test to detect a fetal heartbeat."[48] Conversely, if they are not in any respect suing to redress violations of their own rights, then their lawsuits are purely vehicles for the sanctioning of those who violate this prohibition.

At this point it would seem fitting to frame the crucial issue in *Jackson* as a question of whether S.B. 8 suits constitute "state action." And indeed the United

47 Article III standing is designed to ensure that, for the most part, the federal courts adjudicate cases brought by persons with an interest in obtaining a court-ordered remedy for a violation of their own legal rights. In other words, Article III standing is (usually) necessary but not (ever) sufficient to establish that the plaintiff is suing in her own right. Moreover, in at least one instance, the Supreme Court has allowed Congress to confer standing on a class of private actors who do not sue to vindicate their own legal rights by effectively assigning the federal government's legal rights to members of the class through a *qui tam* statute. *Vermont Agency of Nat. Res. v. United States*, 529 U.S. 765, 773–74 (2000).

48 Tex. Health & Safety Code Ann. § 171.204(a).

States Solicitor General appears to have taken exactly this route (in its separate lawsuit against the State of Texas regarding S.B. 8):

> Here, the State has tried to avoid *Ex parte Young* suits by disclaiming enforcement by its executive officials and instead deputizing members of the public. And by not requiring any connection between an S.B. 8 plaintiff and the challenged abortion, the State has tried to make it impossible to identify the universe of persons who will bring S.B. 8 suits in advance. But once S.B. 8 plaintiffs actually bring such suits, their actions are attributable to, and in concert with, the State. By bringing S.B. 8 enforcement actions, S.B. 8 plaintiffs "exercise *** a right or privilege having its source in state authority." *Edmonson* v. *Leesville Concrete Co.*, 500 U.S. 614, 621 (1991). And they may "be described in all fairness as *** state actor[s]." *Ibid.* S.B. 8 plaintiffs rely on "governmental assistance and benefits" – a state-created cause of action, and the promise of a $10,000 bounty; they perform the "traditional government function" of enforcing Texas's abortion restrictions, without any private injury; and the result of the scheme is to chill constitutional rights in a manner and to a degree that private actors could not achieve without "the incidents of government authority." *Id.* at 620–622.[49]

As is perhaps evident from this passage, however, the content of the idea of "state action" is ambiguous as between at least two ideas. On one rendering, suits by S.B. 8 plaintiffs present themselves in a manner that suggests some sort of affiliation or coordination with, or endorsement by, state officials. On the other, suits by S.B. 8 plaintiffs are in fact enforcement actions by the state because the state has actually deputized these plaintiffs to enforce Texas law. Our analysis suggests that the latter characterization is preferable.[50]

The question, as we see it, is whether Texas' prohibition of certain abortions—assuming that the substantive constitutional argument of the petitioners is correct—counts as the state chilling the exercise of a constitutional right, given that Texas governmental officials (as conventionally understood) are barred from (directly) sanctioning violations of the rule. Our answer, for two related reasons, is "yes."

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49 Brief for Petitioner, United States of America v. Texas (No. 21–588), 2021 WL 5029058 at *35–36.

50 Illustrative of problems with notions of state action that emphasize attribution or coordination is the treatment of state action in *Lugar. v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Edmonson Oil sued Lugar for a debt and obtained a prejudgment writ of attachment from a state court clerk, which writ was executed against Lugar's property by a county sheriff. When the attachment was later dismissed by a state court, Lugar sued Edmonson Oil under 42 U.S.C. § 1983 for depriving him of his property without due process of law. In a 5-4 decision, the Court concluded that there was state action subject to due process constraints because: (1) the deprivation experienced by Lugar resulted from the exercise of a power conferred on Edmonson Oil by Virginia law, and (2) the attachment involved Edmonson Oil *jointly participating* with the court clerk and the sheriff in the seizure of Lugar's property. Regardless of whether the result reached in the case was sound, it seems to us implausible to characterize Edmonson Oil as acting in the capacity of a state official just by virtue of having availed itself of available legal remedies that, to be effected, require actions by governmental officials.

These reasons concern how best to characterize two aspects of S.B. 8 lawsuits: the capacity in which the plaintiff sues, and the basis on which the court imposes liability. Ultimately, the distinction we are aiming to draw is between suits that generate criminal or regulatory liability, on the one hand, and those that generate something like tort liability, on the other. The Constitution envisions states as having broad power to set rules and standards of conduct and to render them enforceable via enforcement actions that impose sanctions for failure to comply. Obviously, it has long been controversial how much the Fourteenth Amendment's Due Process Clause and other constitutional provisions carve out certain domains of conduct that fall beyond this power. Tort liability, by contrast, is not about the state's power to set forth rules of conduct as such. It is about the state's power to afford causes of action to those who can prove that their legal rights against being wrongfully injured have been violated; a power that is in some ways broader and in some ways narrower.[51]

It is therefore the question of tort, not the question of standing, that matters for purposes of determining whether an S.B. 8 plaintiff is an equivalent to the Texas attorney general or a delegee of that official or some other state law-enforcement official. What we need to know is whether these plaintiffs are genuine tort plaintiffs, or akin to tort plaintiffs, *not* whether there was a stake for them sufficient to generate standing.[52] To the extent that Justice Sotomayor herself seems to have reached the opposite conclusion in footnote four (by suggesting that the issue is standing), she did not aid the cause for which she argued. This is yet another example of how our legal discourse has suffered through the loss of an adequate grasp of the private/public distinction. Even jurists who see the point at crucial moments—as did Justice Sotomayor in *Jackson*—do not see it clearly.

As noted, Solicitor General Stone argued that S.B. 8 actions are tort claims, or tort-like. But his argument is entirely unconvincing. On the question of

51 We have argued elsewhere that the Supreme Court's imposition of due process limits on punitive damages reflects this same distinction between public-law notions of law enforcement and private-law notions of providing redress to victims of legal wrongs. *See* Benjamin C. Zipursky, Palsgraf, *Punitive Damages, and Preemption*, 125 Harv. L. Rev. 1757 (2012).

52 The Supreme Court has of course held that the prosecution (or resolution) of certain kinds of private-law claims counts as state action. This is not because all such suits necessarily constitute state action, but instead because of special features of the cases in question. John C. P. Goldberg & Benjamin C. Zipursky, *From* Riggs v. Palmer *to* Shelley v. Kraemer: *Judicial Power and the Law-Equity Distinction*, *in* Philosophical Foundations of the Law of Equity 291, 306–11 & n.64 (Dennis Klimchuk, Irit Samet & Henry E. Smith eds., 2020). Justice Gorsuch's *Jackson* opinion clearly rejects the suggestion that a putatively private lawsuit can generate a constitutional claim under a state-action theory just by virtue of having been brought under statutes with at least partially deterrent purposes. Indeed, that rejection is the premise of his argument against Justice Sotomayor's footnote four reasoning.

whether these are a special category of IIED claims recognized as such by the legislature, the answer is plainly not.[53] More broadly, it is not plausible to interpret the Texas Act as recognizing claims of redress for a legal wrong to individuals. The statute contains nothing that requires proof of any form of injury, emotional or otherwise. Nor does it suggest that the money a successful claimant stands to receive is a remedy, i.e., redress for an invasion of plaintiffs' legal rights not to be wrongfully injured. Instead, it commands courts who determine that a violation has occurred to enjoin the defendant against future violations of the Act and to order the defendant to pay the plaintiff at least $10,000 for each proven violation. It is also notable that S.B.8 contains something akin to a double jeopardy clause, revealing another way in which it is closer to a form of criminal law that it is to tort law.[54]

In sum, everything about the structure and substance of the Act indicates that the money claimants stand to recover under it is not compensation (or some other kind of redress) reflective of the claimant having suffered a wrongful injury at the hands of the defendant, but is instead a fine that happens to be collectable by a bounty hunter instead of payable to the state treasury. For present purposes, we do not question whether the Texas legislature has the authority to enact a bounty-hunter law of this sort. Our point instead is that, if a court were to impose liability in response to a claim by an S.B. 8 plaintiff, the ground of that liability would be the defendant's having violated a Texas-law rule of conduct, which rule the plaintiff is enforcing on behalf of the state. And if that is the basis for liability, then the power to create such liability through a private lawsuit is by its nature an exercise of a power that, if it is enjoyed by anyone, is enjoyed by the state in its capacity as law-enforcer.[55]

In the end, what is needed to explain and vindicate Justice Sotomayor's footnote is an account of the difference between private rights of action that vindicate individuals' substantive legal rights (while perhaps also indirectly serving other functions), and private rights of action that, in the manner of *qui tam*

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53 Our summary explanation of why S.B.8 plaintiffs do not have IIED claims can be found in Tessa Stuart, *Abortion Access Hurts Pro-Lifers' Feelings, Texas Attorney Argues to Supreme Court*, Rolling Stone (Nov. 2, 2021, 11:44 AM), https://www.rollingstone.com/politics/politics-news/sb8-abortion-texas-supreme-court-1251678/.

54 Tex. Health & Safety Code Ann. § 171.208(c) (specifying that courts may not award relief to a claimant under the Act for any violation for which the defendant has already paid statutory damages).

55 We leave aside questions about whether such a delegation is constitutionally permissible. For example, at the federal level, some litigants have argued that *qui tam* actions are delegations of law enforcement that violate Article II's Appointments and "take Care" clauses. *Vermont Agency of Nat. Res. v. United States*, 529 U.S. 765, 778 n.8 (2000) (declining to address these issues).

actions, serve as a means of law enforcement, thus rendering them state action in a literal sense. In other words, what is needed is the distinction between private law and public law. The ground for inferring that plaintiffs who sue under the Texas Act are mere delegees of state power is *the combination of the law's deterrent aims (and remedial provisions in furtherance of those aims) and the absence of any plausible claim for redress based on a legal wrong done to—a rights-violation suffered by—the plaintiff*. While the power to sue and recover that is conferred on claimants by antitrust laws, federal civil rights laws, and the common law of torts may well serve the goal of deterrence, the choice of whom to empower to bring such suits and why those persons are so empowered has never rested exclusively or primarily on deterrence grounds. Rather, it has rested on the principle that they should be empowered to vindicate their first-order legal rights: their right not to be subject to unfair competition, not to be discriminated against, and not to be wrongfully injured. Understanding the difference between rights of action that vindicate individual rights, on the one hand, and rights of action that merely serve public policy goals, on the other, is the key to understanding why Justice Sotomayor's footnote four is correct to maintain that suits authorized by the Texas Act, unlike standard-issue tort actions, really are public enforcement actions.

No doubt the strategic success of S.B. 8 derives in part from the fact that many members of the public have strongly held beliefs about the propriety or impropriety of abortion. And clearly, the language of "protecting the unborn child" has resonated with a significant portion of the population. Indeed, so many people seem to care about the issue so deeply that it might seem arrogant for us to deny that the performance of abortions is something that matters profoundly to others, including to persons who might sue under S.B. 8. We need not deny any of this, however. Our point is not *whether it matters* to a third party if a woman has an abortion. Rather, it is whether S.B. 8 is plausibly interpreted to empower a private citizen *to redress a legal wrong done to him or her by a physician performing an abortion or a person aiding a stranger to obtain an abortion*. It is not.[56]

56 While it is not plausible to construe the Texas Act as having recognized a new statutory tort, it is an interesting question whether the state legislature could have evaded federal court review by fashioning a rule under which the performance of an abortion so as to cause emotional distress to another would be a tort (i.e., a violation of the victim's legal right not to be distressed by another in that manner). That the legislature did not go this route is probably telling. A plaintiff suing for this imagined tort would have to endure the standard ordeals of civil litigation, including being deposed about their health histories, underlying mental conditions, and the like, which presumably would dampen potential plaintiffs' enthusiasm for bringing S.B. 8 actions. The legislature might also have worried that recognition of this imagined statutory tort would serve as precedent for what it might regard as less desirable expansions of liability. Indeed, it is easy to imagine a court relying on such a statute in support of recognizing as tortious and therefore actionable an

Legal scholars of a progressive bent have long maintained that evisceration of the distinction between public and private law is critical to legal progress. Doing so, however, has left them without the resources to make the sort of critique of S.B. 8 that they want to make and are entitled to make. Although a Supreme Court majority found a basis for a pre-enforcement challenge, it also seems to have given state lawmakers a roadmap for avoiding that outcome in the future, whether the law at issue involves limitations on due process rights or the right to bear arms. If there is a basis for resisting this sort of maneuver, it will require an embrace, rather than a rejection, of the public law-private law distinction.

6 Conclusion

Underlying the tort-law-as-public-law mindset has been a longstanding worry about the significance, or lack of significance, of 'mere' private law. This is an insecurity that tort theorists are now, slowly, getting over. But there has been a lag in legal education and practice, and that lag has taken its toll. Whether it is the lost plaintiff in mass torts, the two-dollar coupon securities class action, or the blunderbuss shearing away of compensation in ordinary tort claims today, innumerable parts of American law have been damaged by the tort-law-is-just-public-law crusade. It is a cruel irony that what began as an earnest intellectual escapade by progressives wishing to advance their public-law goals has become a weapon for conservatives who wish to avoid constitutional scrutiny in the heartland of public law.

Acknowledgments: For helpful comments on earlier drafts, thanks to Rachel Bayefsky, Ben Eidelson, Dick Fallon, Abner Greene, Clare Huntington, Andrew Kent, John Manning, Stephen Sachs, Tony Sebok, and Jed Shugerman**.** Remaining errors are most definitely our own.

array of instances involving wrongful infliction of emotional distress (for example, an act of negligence or racial discrimination by *D* against *T* that, when it becomes known to *P*—a complete stranger to *D* and *T*—greatly upsets *P*).